



## **ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 85, 86, 600**

**[EPA-HQ-OAR-2009-0472; FRL-9772-7]**

### **Denial of Reconsideration Petition on Model Year 2012-2016 Light Duty Vehicle**

#### **Greenhouse Gas Emissions Standards**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Denial of petition for reconsideration.

**SUMMARY:** The Environmental Protection Agency (EPA or Agency) is providing notice that it is denying the petition of the Pacific Legal Foundation (PLF) to reconsider the final rules establishing greenhouse gas emissions standards from light duty motor vehicles for model years 2012-2016.

**DATES:** This action is effective on [insert date of publication in the Federal Register].

**ADDRESSES:** EPA's docket for this action is Docket ID No. EPA-HQ-OAR-2009-0472. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal

holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Steven Silverman, Office of General Counsel, Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460; telephone number: (202) 564-5523; email address: silverman.steven@epa.gov.

**SUPPLEMENTARY INFORMATION:**

*Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this Decision.

APA	Administrative Procedures Act
API	American Petroleum Institute
CAA	Clean Air Act
CO <sub>2</sub>	Carbon dioxide
CH <sub>4</sub>	Methane
EPA	Environmental Protection Agency
FOIA	Freedom of Information Act
FR	Federal Register
GHG	Greenhouse gas
HFC	Hydrofluorocarbon
LDVR	Light Duty Vehicle Rule
MY	Model year

N <sub>2</sub> O	Nitrous oxide
NHTSA	National Highway Traffic Safety Administration
PLF	Pacific Legal Foundation
SAB	Science Advisory Board

## I. Introduction

On May 7, 2010, the EPA published final rules establishing standards limiting emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O) and hydrofluorocarbons (HFCs) from new light duty motor vehicles, including passenger cars, medium duty passenger vehicles, and light trucks for model years 2012-2016. 75 FR 25324. In this joint rulemaking, the National Highway Traffic Safety Administration (NHTSA), on behalf of the Department of Transportation, issued rules to reduce fuel consumption from these vehicles. Together these rules comprise a coordinated and comprehensive National Program designed to address the urgent and closely intertwined challenges of reducing dependence on oil, achieving energy security, and ameliorating global climate change. PLF petitioned EPA to reconsider its greenhouse gas standards. Because the petition does not state grounds which satisfy the requirements of section 307 (d)(7)(B) of the Clean Air Act, EPA is denying the petition.

## II. Standard for Reconsideration

Section 307 (d)(7)(B) of the Clean Air Act (CAA) states that: “Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection

within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit. Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed pending such reconsideration, however, by the Administrator or the court for a period not to exceed three months.”

Thus, reconsideration is required only if a petition for reconsideration shows that the objection or claim could not have been presented during the comment period—either because it was impracticable to raise the objection during that time or because the grounds for raising the objection arose after the period for public comment but within 60 days of publication of the final action (i.e. “the time specified for judicial review”). To be of central relevance to the outcome of a rule, an objection must provide substantial support for the argument that the promulgated regulation should be revised. See Coalition for Responsible Regulation v. EPA, 684 F. 3d 102, 125 (D.C. Cir. 2012); see also 76 FR 28318 (May 17, 2011) and other actions there cited.

Because all of the objections or claims raised in PLF’s petition could have been presented to EPA during the comment period for the rulemaking, and because PLF has failed to demonstrate that its objection is of central relevance to the outcome of the rulemaking, EPA is denying the request for reconsideration.

### III. PLF's Petition for Reconsideration

In its petition, PLF alleges that EPA failed to comply with the requirements of 42 U.S.C. section 4365 (c)(1). This provision states that “[t]he Administrator, at the time any proposed criteria document, standard, limitation or regulation under the Clean Air Act, the Federal Water Pollution Control Act, the Resource Conservation Recovery Act, the Noise Control Act, the Toxic Substances Control Act, or the Safe Drinking Water Act, or under any other authority of the Administrator, is provided to any other Federal agency for formal review and comment, shall make available to the [Science Advisory Board, or SAB] such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.” Section 4365 (c)(2) then provides that “[t]he Board may make available to the Administrator, within the time specified by the Administrator, its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation, together with any pertinent information in the Board’s possession.”

PLF maintains that EPA failed to make the proposed model years (MYs) 2012-2016 light duty vehicle greenhouse gas (GHG) rule available to the SAB. PLF then argues that this alleged failure is of central relevance to the outcome of the rulemaking, arguing that an “utter failure” of EPA to comply with a procedural requirement imposed by a statute other than the Clean Air Act is of central relevance if there is any uncertainty as to the impact of the failure (Petition pp. 7, 17-18), or in the alternative that there is a substantial likelihood that the rule would have significantly changed absent the alleged procedural error by EPA (*id.* pp. 8, 18-21). PLF maintains that there is a substantial likelihood that the rule would have changed by assuming that the SAB would have provided scientific and technical advice to EPA of sufficient import to

change the rule's outcome, consistent with the SAB's august scientific standing and the Congressional purpose in establishing the opportunity for SAB review. Id. PLF further maintains that it could not raise its objection to EPA until after the close of the public comment period to the rulemaking, stating that it did not become aware of the issue until November 10, 2010, when EPA replied to PLF's Freedom of Information Act request seeking copies of "[a]ll documents, memorandums (sic) or correspondences (sic) dealing with the question of whether EPA should submit, or should have submitted, information to the Science Advisory Board in connection with the promulgation of the [light duty vehicle rule] LDVR". PLF FOIA Request of September 15, 2010 p. 1.

#### IV. EPA's Response

1. PLF has failed to demonstrate that "it was impracticable to raise [its] objection" during the period for public comment in the rulemaking, or in the time specified for seeking judicial review (i.e. within 60 days of the rule's publication – July 10, 2010), as required by CAA section 307 (d)(7)(B).

PLF's objection is legal in nature, and thus could be raised at any time. PLF maintains that it could not raise its objection until receiving a response to its Freedom of Information Act request, but this is not correct. PLF's public comments could simply have stated PLF's belief that 42 USC section 4365 (c) requires EPA to submit the proposed rule to the SAB, and that any failure to do so is error. PLF states that it required an answer to its FOIA request before raising its objection because only then did it learn that EPA had not submitted the light duty vehicle proposal to the SAB. Petition p. 13. But its objection does not require this answer. Moreover, PLF did not submit its FOIA request until September 15, 2010, well after the rule was signed,

disseminated electronically, and published, and after the period for seeking judicial review of the rule had expired. Thus, even under its view, the grounds for PLF's objection did not arise until after the time period for judicial review so that PLF's objection was raised in an untimely manner regardless of its argument concerning its FOIA petition. In addition, EPA's FOIA response does not provide PLF with information necessary to raise its objection, since the FOIA request asked whether EPA "submitted" the proposed rule and related documents to the SAB. The statutory requirement in section 4365(c) is for EPA to "make available" certain proposals to the SAB, as discussed below. Thus, PLF was in essentially the same position after receiving EPA's FOIA response as it was before its request. The same objection it raised in the petition could have been raised during the public comment period.

2. PLF fails to demonstrate that its objection is of central relevance to the outcome of the rulemaking, as required by section 307 (d)(7)(B).

First, PLF fails to demonstrate that 42 U.S.C. 4365 (c)(1) is applicable. That provision applies only when EPA submits certain documents to other agencies "for formal review and comment." The light duty vehicle GHG rule implements section 202 (a) of the Clean Air Act. That provision contains no requirement that implementing regulations be submitted to other federal agencies for formal review and comment, nor did EPA do so. EPA submitted the draft of the proposed rule to the Office of Management and Budget for informal interagency review , pursuant to Executive Order 12866, but this is not the type of formal review to which section 4365 (c)(1) speaks. See Coalition for Responsible Regulation v. EPA, 684 F. 3d at 124 (noting this distinction); compare CAA section 202(a) with 49 U.S.C. section 32902 (b) and (j) requiring the Secretary of Transportation to consult with the Secretary of Energy and the Administrator of EPA before prescribing average fuel economy standards for light duty motor vehicles, and

requiring the Secretary of Transportation to provide a period of time for the Secretary of Energy to submit comments and for those comments to be included in any proposal issued by the Secretary of Transportation; see also CAA section 231 (a)(1)(B)(i) (“The Administrator shall consult with the Administrator of the Federal Aviation Administration on aircraft engine emission standards”).

Second, even assuming that the provision applies, EPA did make the proposed regulation and supporting information available to the SAB in advance of the public comment period. Documents are made available when they are “accessible” or “obtainable.” Collins English Dictionary—Complete and Unabridged (Harper Collins 2003) (definition of “available”). EPA made the proposed rule and underlying support documents accessible and obtainable by publication of the proposed rule in the Federal Register, and via mass electronic dissemination by posting both the proposed rule and all of the scientific and technical support documents on the Agency’s website essentially contemporaneously with their signature by the Administrator.<sup>1</sup>

Third, even assuming *arguendo* that EPA committed a procedural error, PLF has failed to demonstrate that its objection provides substantial support for the argument that the promulgated regulation should be revised, and therefore is of central relevance to the outcome of the rule. CAA section 307 (d)(7)(B).

PLF argues that there is a substantial likelihood that the rule would have changed if EPA had followed the claimed procedure, by assuming that the SAB would have provided scientific and technical advice to EPA of sufficient import to change the rule’s outcome, consistent with

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<sup>1</sup> EPA is aware that the D.C. Circuit, in holding that EPA had not made available a proposed regulation to the SAB, stated that EPA had not “submitted” the proposed regulation to the Board. American Petroleum Inst. v. EPA, 665 F. 2d 1176, 1189 (D.C. Cir. 1981). This case, however, antedated the present period of instantaneous availability of documents via electronic dissemination. EPA believes that by publishing and posting the proposed regulation and the scientific and technical support documents those materials have been made available to the SAB.



the SAB's scientific standing and the Congressional purpose in establishing the opportunity for SAB review. Petition pp. 8, 21. This is unpersuasive. The SAB explicitly declined to consider and "make available ... advice and comments on the adequacy of the scientific and technical basis" on the proposed light duty vehicle GHG standards for model years 2017 to 2025 in response to EPA's communication to SAB about the proposal and supporting documents.<sup>2</sup> That proposal built upon and was closely related to the rulemaking that established the standards for MYs 2012-2016, the subject of PLF's petition here. Moreover, as in the MYs 2017-2025 rulemaking, substantial issues of pure science were not presented in the MYs 2012-2016 rulemaking. Instead the critical issues were what technologies are available for light-duty vehicles to reduce greenhouse gases for MYs 2012-2016, the cost and effectiveness of those technologies, and their availability in the lead time provided by the rule, making SAB participation both less likely and less pertinent. See 75 FR at 25403-04. Indeed, none of the public comments in the MY2012-2016 rulemaking took serious issue that EPA had overestimated potential technology availability, penetration and cost.<sup>3</sup> See EPA, *Light Duty Vehicle Emission Standards and Corporate Average Fuel Economy Standards: EPA Response to Comment Document* (EPA-420-R-10-012, April 2010), section 3. There were no judicial challenges to the rule's substantive standards at all. See Coalition for Responsible Regulation, 684 F. 3d at 126. Given these circumstances, EPA does not see any significant likelihood that SAB involvement would have occurred or would have changed significantly the technology-based standards adopted in the rule. The petitioner has therefore failed to carry its burden of

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<sup>2</sup> PLF did not present either oral or written statements to the SAB at its public meeting, even though the meeting was publically noticed, comments were solicited by the SAB, and other entities submitted an oral and written statement to the SAB (addressing a different proposed rule). See 77 FR 12579, 12580 (March 1, 2012) and EPA-HQ-OAR-2010-0799-11793

<sup>3</sup> PLF indicates that its interest in the rulemaking is that its members are light duty vehicle users and may incur greater costs as a result of the light duty vehicle rule's stringency, Petition pp. 2-3, although it submitted no comments on these issues.

showing that its objection provides substantial support for the argument that the promulgated regulation should be revised and therefore is of central relevance to the rule. CAA section 307 (d)(7)(B).

Notwithstanding the clear requirement in section 307 (d)(7)(B) that its objection must be of central relevance to the outcome of the rule, PLF argues that it does not have to make a showing to that effect. PLF argues instead that the test under section 307(d)(7)(B) varies depending on whether the procedural requirement at issue derives from the CAA or from another statutory provision. While PLF's argument is not exactly clear, PLF argues that for procedural requirements imposed by a statute other than the CAA, an "utter failure" to comply with a required procedure is not harmless error under section 307 (d)(7)(B) if there is any uncertainty of the impact of the error. For procedural requirements imposed by the CAA, PLF argues that the explicit test of section 307(d)(8) applies, "substantial likelihood that the rule would have been significantly changed if such errors had not been made." PLF argues that this case falls under the first asserted principle, as the procedural requirement derives from a statute other than the CAA. PLF thus argues there was an utter failure to comply with 42 U.S.C. section 4365 (c), and there is some uncertainty of the impact of the failure. In the alternative, they argue that even if the second test applies, this case meets the criteria of section 307(d)(8), citing to Kennecott Corp. v. EPA, 684 F.2d 1007 (DC Cir. 1982)

EPA disagrees that this bifurcated scheme is the appropriate test to apply. Section 307(d)(7)(B) is the applicable provision here, and its test is whether PLF's objection provides substantial support for the argument that the promulgated regulation should be revised. There is no basis in the text of section 307(d)(7)(B) to draw a distinction based on whether a procedural requirement is imposed by the Clean Act or by another statute. Section 307(d)(7)(B) establishes

the same requirements irrespective of the statutory source of the procedural requirement a petitioner points to. Section 307(d)(7)(B), like section 307(d)(8), embodies a significant hurdle for administrative reconsideration, and reflects the value placed on preserving the finality of EPA decision making. 75 FR 49556, 49560-62 (August 13, 2010). This is so whether the procedural requirement derives from the CAA or from another statute.

The cases cited by PLF do not support their view of a bifurcated scheme under section 307(d)(7)(B). PLF argues that “[w]hen an administrative agency utterly fails to comply with a procedural rulemaking requirement imposed by a statute other than the one under which the rule is being promulgated, the failure cannot be considered harmless error if there is any uncertainty regarding what the rule may have been but for the failure.” Petition p. 7. PLF cites New Jersey v. EPA, 626 F. 2d 1038, 1049-50 (D.C. Cir. 1980) and Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F. 3d 89, 96 (D.C. Cir. 2002) for this proposition. However these cases do not pronounce the general rule petitioners claim, and are not on point. Both State of New Jersey and Sugar Cane Growers concerned rules that were not subject to section 307(d) at all, so the cases do not address and are not relevant to the requirement imposed by section 307(d)(7)(B). Rather, both cases dealt with a failure of the government agency to follow the notice and comment procedures required for rulemaking under the Administrative Procedure Act (APA). The views of the court on the lack of harmless error under those specific circumstances addressed that violation of the APA, and did not provide a more general rule applicable to any and all other procedural violations or other statutes. Here, EPA fully complied with the rulemaking procedures required under CAA section 307(d). There was no “utter failure” to conduct notice and comment rulemaking procedures.

As discussed above, EPA was not required to but did make the proposed rule available to the SAB pursuant to 42 USC section 4365 (c)(1). Under that statute there is no requirement or expectation that the SAB will in fact voluntarily provide advice and comments to EPA and in this case, as discussed above, subsequent SAB action concerning the MY2017-2025 rulemaking proposal to control greenhouse gases indicates just the opposite. The New Jersey and Sugar Cane cases thus addressed wholly different circumstances, and provide no basis to find that the requirement of CAA section 307(d)(7)(B) does not apply to this rulemaking according to its terms or that the test it sets for reconsideration has been met.

Moreover, the D.C. Circuit recently held with respect to 42 USC section 4365 (c)(1) itself that a petitioner “must sho[w] that this error was ‘of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.’” This was not satisfied when petitioners provided no more of a showing than alleging that EPA had failed to comply with this provision. Coalition for Responsible Regulation v. EPA, 684 F. 3d at 124. The Court applied the test in section 307(d)(8) without drawing any distinction based on the statute that was the source of the procedural requirement. The same applies under section 307(d)(7)(B), and as with section 307(d)(8), more must be shown than simply alleging that EPA failed to comply.

The petitioner’s citation of Small Refiners Lead Phase –Down Task Force v. EPA, 705 F. 2d 506, 522-23 (D.C. Cir. 1983) also does not support its argument. The petition argues that the 1977 amendments to the Clean Air Act were intended to supplement the procedural requirements of the Administrative Procedure Act, not replace them. Petition p. 9. Construing section 307 (d)(8)’s requirement that a procedural error creates a “substantial likelihood that the rule would have been significantly changed”, the court stated that “[a]t a minimum, failure to observe the

basic APA procedures, if reversible error under the APA, is reversible error under the Clean Air Act as well.” The court immediately cautioned, however, “[o]n the other hand, section 307(d)(8) sets a restrictive tone for our review of procedural errors that would not violate the APA”, citing Sierra Club v. Costle (657 F. 2d at 391) for the proposition that “the essential message of so rigorous a standard for procedural reversal is that Congress was concerned that EPA’s rulemaking not be casually overturned for procedural reasons.” 705 F. 2d at 523. Since the APA itself contains a harmless error provision (5 USC section 706), requiring petitioners to show a likelihood that the rule would have changed is not a diminution of the APA but a gloss on it. Thus, the holding in Small Refiners was limited to violations of the notice and comment requirements of the APA, and, contrary to PLF’s claim, the court did not pronounce a general rule establishing a different test for any and all procedural requirements imposed by other statutes. Rather, in discussing procedural requirements other than the APA, the court indicated that section 307(d)(8) applied and set a restrictive tone for judicial review of such errors.

More basically, the D.C. Circuit has twice held that failure to comply with the requirements of section 4365 (c)(1) is not reversible error where petitioners fail to show that the error is of such central relevance to the proceeding that there is a substantial likelihood that the rule would have significantly changed but for the (claimed) procedural violation. Coalition for Responsible Regulation v. EPA, 684 F. 3d at 124; API v. EPA, 665 F. 2d at 1188-89. The fact that the procedural requirement at issue in those cases stems from a statute other than the CAA made no difference and did not change the burden on the petitioner to prevail on their objection. The same applies under section 307(d)(7)(B).

Finally, PLF points to Kennecott Corp. v. EPA, 684 F.2d 1007 (DC Cir. 1982) as support for its claim that EPA’s alleged failure to comply with this statutory provision satisfies the

requirements of section 307(d)(8). As noted above, this same claim was recently rejected in Coalition for Responsible Regulation v. EPA, 684 F. 3d at 124. Here, PLF does no more than describe the purpose of this provision, with no showing of any likelihood of an impact or change on the rulemaking. As discussed above, all of the indications point the other way and indicate no such likelihood, even if one assumes a procedural error was committed.

## V. Conclusion

The objections or claims raised in PLF's petition could have been presented to EPA during the comment period for the rulemaking, and the grounds for the objections did not arise after the period for public comment but within the time specified for judicial review. In addition, PLF has failed to demonstrate that its objection provides substantial support for the argument that the promulgated regulation should be revised and therefore has failed to demonstrate that its objection is of central relevance to the outcome of the rulemaking. Based on this, EPA is denying the request for reconsideration.

Dated: January 14, 2013.

Lisa P. Jackson, Administrator.

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